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硕 士 学 位 论 文

刑事和解的理论基础与制度构建

——兼谈 2012 年刑事诉讼法理解与适用

Theoretical Basis and System Construction of Criminal
Reconciliation——Concurrently Discussing on Understanding and
Application of the Criminal Procedure Law of 2012

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摘 要

刑事和解因契合我国当前建设和谐社会的需要以及宽严相济的刑事政策而得到了理论界与实务界的广泛认同，自 2002 年起，司法实务部门进行了广泛的刑事和解实务探索。2012 年 3 月 14 日我国全国人民代表大会通过并正式颁布了《全国人民代表大会关于修改〈中华人民共和国刑事诉讼法〉的决定》，2012 年修改后的刑事诉讼法在第五编增设专章规定了我国公诉案件刑事和解程序。作为修复性司法的一种实践形态，刑事和解是一把双刃剑，一方面，其蕴含并承载着丰富的刑罚理念与刑事政策功能；但另一方面，如果运用不当，也会严重损害刑事司法的公平正义。本文旨在通过对刑事和解的概念及相关法律理念的梳理，分析总结司法实务有关刑事和解的探索经验及其问题，以期发掘出对刑事和解适用有启发意义的规则，并就此推动刑事诉讼法最新修正的正确理解与贯彻实施。

本文除引言和结语外，共分四章。前二章论述刑事和解的一般理论问题，后二章则是探讨刑事和解的司法适用。第一章“刑事和解概述”，主要分析了刑事和解的概念以及与私了、调解等概念的区别，另外探讨了刑事和解起源的社会背景。第二章“刑事和解的理论基础”分别从刑事和解与传统刑法理论三大原则的对立与统一、刑事和解契约观与刑事和解修复观的联系与区别、西方关于刑事和解的三种理论等方面谈了刑事和解的法律理论基础。第三章“刑事和解在我国司法实践的展开”分别从我国刑事和解实践开展简况以及我国刑事和解实践中存在的问题等方面对我国刑事和解制度实践进行概括介绍。第四章“2012 年修改后的刑事诉讼法相关规定的理解与适用”为全文的重点，笔者谈了个人对 2012 年刑事诉讼法修改关于刑事和解制度规定的理解，重点谈了刑事和解适用的范围、刑事和解适用的条件、刑事和解的原则、刑事和解的参与主体、刑事和解的程序等五个方面。

关键词：刑事诉讼法修正；刑事和解；修复性司法；司法适用

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Abstract

Criminal reconciliation has been widely acknowledged in the theory and practice fields because of its according with the need for building a harmonious society and criminal policy of combining punishment with leniency in China. Judicial practice departments has carried out wide exploration of criminal reconciliation from 2002 and the procedure of criminal reconciliation has been regulated in Title V of Criminal Procedure Law according to Decision of the National People's Congress on Revising the Criminal Procedure Law of the People's Republic of China in March 14, 2012. As a kind of practical form of restorative justice, criminal reconciliation is a double-bladed sword. Concretely speaking, on the one hand, it contains and bears on abundant ideas about penalty and functions of criminal policy, on the other hand, if used improperly, it will seriously damage the criminal judicial justice. In this article, firstly, the author summarizes the concept of criminal reconciliation and related legal ideas. Secondly, the author will analyze and summarize the experience and problems in the judicial practice of criminal reconciliation. Finally, author will try to find out the rules helpful to apply the criminal reconciliation and promote the correct understanding and implementation of the newest amendment to Criminal Procedure Law.

In addition to the introduction and the conclusion, the article includes four chapters. Author has discussed the general theory about criminal reconciliation in the former two chapters and has analyzed the judicial application of criminal reconciliation in the last two chapters. In chapter one, author has analyzed the concept of criminal reconciliation and the differences between criminal reconciliation and compounding in private and meditation and so on. In addition, the social background of the origin of criminal reconciliation has been discussed in this chapter. In chapter two “theoretical foundation of the criminal reconciliation”, author has discussed the unity and opposites between criminal reconciliation and three principles of traditional theory of criminal law, the connection and difference between the contract concept and the restoration concept about criminal reconciliation and three theories on criminal reconciliation in western world. In chapter three “the expansion of criminal reconciliation in China's legislation and practice”, author has introduced the practice

of criminal reconciliation system in China, such as overviews about the practice of criminal reconciliation in China and the problems existing in the practice of criminal reconciliation. In chapter four “understanding and application of the relevant provisions of Criminal Procedure Law of 2012”, as the key part of the full text, author has discussed the understanding on the provisions of criminal reconciliation system. Author has mainly analyzed the scope of application, application conditions, principles, participation subjects and procedure of criminal reconciliation.

Key words: Amendment to Criminal Procedure Law; Criminal reconciliation, Restorative justice; Judicial application

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引 言

我国当前正处在社会转型时期,刑事和解因契合了和谐社会建设以及宽严相济的刑事司法政策而得到理论界与实务界的广泛认同。自 2002 年起,我国司法实务部门就刑事和解进行了广泛的实务探索,并取得了较好的社会效果。但由于缺乏立法依据,没有统一的规范,特别是对刑事和解的修复理念还有一些认识上的偏差,导致刑事和解在司法适用中比较混乱,暴露出了一些问题,在一定程度上损害了司法的正义。2012 年修改后的刑事诉讼法在总结实务经验的基础上,于第五编特别程序设立单章规定了公诉案件的刑事和解程序。至此,刑事和解制度在我国刑事法律中得到了正式的确立。作为修复性司法的一种实践形态,刑事和解是一把双刃剑,一方面,其蕴含并承载着丰富的刑罚理念与刑事政策功能;但另一方面,如果运用不当,也会严重损害刑事司法的公平正义。因此,为保证 2012 年修改后的刑事诉讼法的正确理解与贯彻实施,从理论上厘清刑事和解的概念与法律理念,从制度上分析总结司法实务的探索经验及其问题,以期发掘出对刑事和解适用有启发意义的规则,无疑这一研究是必要和有意义的。本文首先介绍刑事和解产生与发展的历史背景,探讨刑事和解蕴含的法律理念,然后回到我国法,分析总结刑事和解在我国司法实务的开展经验与问题,最后在以上分析的基础上,就 2012 年修改后的刑事诉讼法有关刑事和解规定的理解与适用提出建议。

第一章 刑事和解概述

第一节 相关概念的辨析

一、刑事和解的概念

刑事和解，也称为被害人与加害人和解（即 Victim-Offender-Reconciliation，简称 VOR）、被害人和加害人会议，当事人调停或者恢复性司法会商，对它的定义和内涵理论界目前还存在一定争议。理论界比较普遍的观点认为，刑事和解是一种以协商合作形式恢复原有秩序的纠纷解决方式，是在刑事诉讼程序中，加害人以认罪、赔偿、道歉等方式与被害人达成和解协议后，国家司法机关不追究加害人刑事责任、免除处罚或者对其从轻处罚的一种制度。^①

传统刑事司法理论认为，犯罪不仅是对个人利益的侵害，更是对公共权益的侵害。所以一旦犯罪行为发生后，作为公共利益的维护者国家就出面运用强制手段对犯罪行为进行追究，也就是说，犯罪行为是必须由国家出面惩治的行为。而刑事和解，在犯罪发生后允许加害人与被害人商谈，双方协商来解决犯罪人所造成的伤害，对于传统刑事理论来说，这无疑是一种全新的犯罪处置方式和刑事司法理念。

二、刑事和解的特征：

刑事和解具有以下三个特征：

第一，以保护被害人权利为中心。与传统刑事司法相比，刑事和解最大的不同是对被害人的利益关注。在刑事和解中，被害人作为一个积极的主体，向加害人提出自己的请求，获得损失赔偿。

第二，以加害人和被害人的自愿为前提条件。在刑事和解程序中，和解与否、和解形式以及和解结果完全取决于双方当事人的自由意志，其他任何人方均不得以胁迫或其他不当甚至违法手段影响和解当事人，迫使其和解。

第三，目的是为了实利益的最大化。刑事和解中，加害人和被害人通过会谈协商达成和解协议。对被害人来讲，一方面他因被犯罪侵害而遭受的精神创伤可以得到有效的恢复，另一方面，他所遭受的物质损失也可以得到一定的补偿；

^① 陈光中,葛玲.刑事和解初探[J].中国法学,2006,(5):3.

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